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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 560

LESTER DAVIS,

Petitioner,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Having concluded that the Trial Court erred in sending the case to the jury, the Court of Appeals of Maryland failed to decide respondent's further contention that the Trial Court's instructions to the jury constituted reversible error. In this posture of the case, respondent believes the only question presentable to this Court by the present petition is:

1. In an action under the Federal Employers' Liability Act, was the Court of Appeals of Maryland correct in holding that the evidence was insufficient to permit the jury to conclude with reason that employer negligence played a part in producing petitioner's injury?

STATEMENT OF THE CASE

The facts material to the contentions raised by petitioner are as follows:

The petitioner was employed by respondent as a tallyman and trucker (E. 6). On January 2, 1959 he was assigned to handle freight at Pier 8 of the Locust Point terminal in Baltimore (E. 6, 7). Pier 8 (an enclosed pier), has two floors (E. 7). Davis's foreman told him to gather merchandise from the second floor and bring it to the first floor (E. 12). The pier has four freight elevators, two on the east side of the pier and two on the west side opposite each other and about 100 feet apart. The elevators are not connected to the pier walls. Each has both an east and a west gate (E. 10, 11, 44, 50).

Davis testified he went to the second floor, gathered some boxes on a hand truck, and walked to the vicinity of the south elevator on the east side to check other boxes, which he found he did not want (E. 12, 13). This elevator was not then on the second floor. He yelled for it to come up, and "walked away" (E. 13). He put in his pocket the merchandise list he had been using, pulled out another one, and "started looking". He testified, "As I got closer to look something struck me and I went across the floor down in the elevator shaft and this machine came down beside me" (E. 13). The machine was a Yale fork lift tractor (E. 13). He had been facing east, toward the elevator (E. 18), looking at a box (E. 24, 25), and did not see the tractor before it hit him (E. 25). He was struck in the back (E. 19, 22), and slid on his stomach five to seven feet across the floor into the shaft (E. 18, 22). He fell six or seven feet into the shaft (E. 18, 22) to the top of the elevator (E. 18), landing on his shoulder or his side (E. 23). Davis did not know what hit him until he was in the

shaft (E. 13, 25), and there was no attempt to prove through him how the tractor happened to hit him or who, if anyone, was operating it at the time.

Petitioner's witness Robert Waldon, a longshoreman, testified he had been walking south toward the land end of the pier (E. 30), and when about halfway between the east side elevators (E. 31, 51), which at one point he said were on his left (E. 31) and later said were on his right (E. 47), he noticed a man "standing with a piece of paper in his hand facing the elevator" (E. 30). The man was in front of the east gate of the elevator (E. 50, 65). Waldon glanced away, and "all at once" (E. 30), or "just a second later" (E. 52), he heard an impact and someone scream. He went to the elevator shaft and saw a man in the shaft on top of the elevator (E. 30). A tractor was in the shaft with its blades sticking out, and two or three men were trying to help the man get out of the shaft (E. 30, 32, 50, 53). This was the east side of the elevator, the gate of which was broken (E. 54, 59).

Waldon did not see the tractor at any time until he arrived at the shaft after the accident (E. 50, 51, 52), nor did he know where the men came from who helped the man in the shaft (E. 53). Nevertheless it was through the witness Waldon and through him only, that petitioner attempted to prove the identity of the tractor operator. Waldon testified that "just before I got to the elevator, on the other side of the elevator, I seen a man walking up the pier walking kind of fast" (E. 31). The only identification of this man was that "he was a tall, heavy set man wearing a blue coat" (E. 52). Waldon said that he only saw the man's back, not his face (E. 32, 52). Nevertheless, he ventured the opinion that "I am pretty sure he was not a longshoreman; I am almost sure that he was a B & O employee" (E. 32).

This was the only mention by any witness of such a man. Furthermore, the man was seen by Waldon walking on the west side of the elevator, not the east side where Waldon and the petitioner were (E. 31, 32, 52, 55). In addition, Waldon made it clear that the man was merely "near" or "about the point of" the elevator on the west side (E. 55). He emphatically denied that he saw the tractor before the accident (E. 50, 51, 52), or that he saw this man or any man on the tractor at any time (E. 53, 55). His testimony may well be summarized in his own words (E. 55):

> "... I hadn't see the tractor. I don't know who was on the tractor; I don't know where the tractor came from; I don't know who was operating the tractor, anything about it. The only thing I heard the impact and when I heard the impact I seen this man going up there."

The petitioner Davis and his witness Waldon were the only non-medical witnesses produced during petitioner's case in chief.

Respondent's employee Arthur Brown, a tractor operator, testified as respondent's witness that he had been using the tractor during the day to palletize sugar (E. 66, 70). Immediately before the accident he had left the tractor to go to the lavatory (E. 66, 67). He parked it near a fire barrel somewhat to the south end of the elevator involved in the accident (E. 66-67, 75), about seventy-five feet from the washroom (E. 76). While in the washroom, he heard a noise, came out, and found the tractor in an elevator shaft which he testified at the trial was on the west side of the pier (E. 68). He waited until the tractor was gotten out of the shaft and retrieved the key from it (E. 68). At the time of the accident he weighed about two hundred to two hundred and ten pounds (E. 69).

Respondent's witness Robert Lee Byrd was the only witness who claimed to have seen the petitioner go into the shaft. He was standing middleway of the pier on the second floor on the east side between the two elevators (E. 77, 78). He "saw Davis get into the tractor, and when he got in the tractor he went back with the tractor, and when he backed up the tractor got away from him, backing back into the elevator on the east side" (E. 78). Byrd was surprised to see Davis use the tractor and he watched him the entire time (E. 82). Brown had left the tractor to go to the toilet downstairs (E. 82).

The final two witnesses were called by the petitioner in rebuttal. Freeman Miller testified that he was part of the same "sugar gang" as Richard Byrd and Leon St. Rose (E. 89, 90). At the time of the accident they were between the two elevators on the west side of the pier (E. 89, 90). Miller heard a scream and ran over to the east side and helped Davis out of the shaft (E. 91, 92). At the time of the scream he and Byrd were seated on some sugar bags (E. 91). Byrd could not have witnessed the accident because he had his eyes closed (E. 91) and because the sugar was piled too high for anyone to see the east side of the elevator from where they were (E. 91, 97). They had been seated on the sugar instead of putting it on pallets because "the sugar stopped moving", which meant that before the accident the operator Brown must have left the tractor or the tractor must have broken down (E. 93, 94, 98).

Leon St. Rose, the last witness, agreed that he and Miller had been seated on the west side behind the bags of sugar when they heard a scream and ran over to the elevator (E. 99, 103), but he denied that Byrd was with them (E. 101). He said the tractor was Brown's tractor and he had never seen Davis operate one (E. 100). However, he testified that at the time of the accident there were not only

B & O men in the vicinity, but also stevedores (E. 102). Some Bull Line Steamship men were working near the elevator, and there were more than ten people in the area (E. 102).

Respondent's motion for a directed verdict at the close of all the evidence was denied, and the jury returned a verdict for petitioner in the amount of $10 000.00. After denial of respondent's motions for a new trial or judgment *non obstante veredicto*, respondent appealed to the Court of Appeals of Maryland, challenging the sufficiency of the evidence to go to the jury and the instructions of the Trial Court to the jury. The Court of Appeals reversed and entered judgment for respondent, holding that the case should not have been submitted to the jury. The Court of Appeals therefore found it unnecessary to rule whether the instructions to the jury contained prejudicial error.

ARGUMENT

THE DECISION OF THE MARYLAND COURT OF APPEALS BEING CLEARLY CORRECT AND IN ACCORDANCE WITH STANDARDS ALREADY ENUNCIATED BY THIS COURT, NO REASON EXISTS FOR GRANTING THE PRESENT PETITION.

A. The Applicable Law Is Clear, Was Understood by the Maryland Court of Appeals, and Requires No Clarification.

Petitioner's suggestion that the present case illustrates a unique need for clarification by this Court of the standards of proof and rules of evidence applicable to F.E.L.A. cases is merely an attempt to create a fictitious issue in support of the petition for certiorari where no such issue in fact exists.

For many years, see *e.g. Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018 (1949), it has been understood that what

constitutes negligence under the F.E.L.A. is a matter of federal law and that the federal decisions are controlling, whether the case be tried in a district court of the United States or in a state court. In numerous decisions in recent years this Court has indicated what proofs are necessary to go to the jury, see *e.g. Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S. Ct. 443 (1956). It has admonished state courts that the rights of employees cannot be defeated under the guise of local practice or procedure, see *e.g., Arnold v. Panhandle & Santa Fe Railway Co.*, 353 U.S. 360, 77 S. Ct. 840 (1957); *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105 (1949). It has clearly established the principle that all substantive aspects of F.E.L.A. cases, including rules of evidence and presumptions to be drawn from the evidence, are to be governed by uniform interpretations drawn from the federal decisions, see *e.g. Eichel v. New York Central Railroad Co.*, 375 U.S. 253, 84 S. Ct. 316 (1963) (admissibility of evidence of retirement benefits); *Sinkler v. Missouri Pacific Railroad Company*, 356 U.S. 326, 78 S. Ct. 758 (1958) (respondeat superior); *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359, 72 S. Ct. 312 (1952) (validity of release); *Jesionowski v. Boston & Maine Railroad Co.*, 329 U.S. 452, 67 S. Ct. 401 (1947) (applicability of res ipsa loquitur).

The Maryland Court of Appeals understood and applied the decisional law of this Court in the present case. As shown by the discussion of the Court in its opinion, it analyzed and measured the case against the standards of *Rogers*, supra, and such other recent cases as *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 78 S. Ct. 608 (1956). The Court's awareness of the standards of proof required in such cases is apparent not only from the opinion in this case but also from its analysis in another recent case, *Perion v. United Fruit Co.*, 226 Md. 591, 174 A. 2d 777 (1961), where

the Court in speaking of the F.E.L.A. said (226 Md. 599; 174 A. 2d 781-782):

> "Since the amendment [53 Stat. 1404 (1939), 45 U.S.C. 54 (1943)] the Supreme Court has by its decisions greatly enlarged the function of the jury and the area they may legitimately review in determining whether an employer was in fact negligent in F.E.L.A. cases, which has resulted in a reciprocal attrition of the judge's function of deciding whether the facts are sufficient to go to the jury in such cases."

It was not in ignorance of the limited scope of judicial review that the Court below acted. Rather, with a full measure of understanding and respect for the guidelines laid down by this Court, the Maryland Court determined that there was no evidence at all, direct or circumstantial, of employer negligence, and having so determined, it reversed the lower court in accordance with the directions of such recent cases as *Inman v. Baltimore and Ohio Railroad Company*, 361 U.S. 138, 80 S. Ct. 242 (1959) and *Herdman v. Pennsylvania Railroad Co.*, 352 U.S. 518, 77 S. Ct. 555 (1957), where similar results were reached.

Petitioner complains that the Maryland Court of Appeals failed to give him the benefit of several evidentiary presumptions. While the issue of res ipsa loquitur was not raised in the courts below, the issue whether a presumption of agency arose from ownership of the fork lift tractor was argued before the Trial Court in chambers and was both briefed and argued in the Court of Appeals without any suggestion, from counsel or court, that the presumption would not apply in an F.E.L.A. case as well as in any other case. Also, this court in *Jesionowski v. Boston & Maine Railroad Co.*, 329 U.S. 452, 67 S. Ct. 401 (1947) defined the elements of the doctrine of res ipsa loquitur and made it clear that such evidentiary presumptions are to be applied

in F.E.L.A. actions. That such presumptions were not applied in petitioner's favor in this case was due not to ignorance or mistake, but simply because they had no relevancy to the facts of the case, as will be discussed hereinafter.

B. THE MARYLAND COURT OF APPEALS CORRECTLY DETERMINED THAT THE EVIDENCE WAS INSUFFICIENT TO PERMIT THE JURY TO CONCLUDE WITH REASON THAT EMPLOYER NEGLIGENCE PLAYED A PART IN PRODUCING PETITIONER'S INJURY.

At the trial only six non-medical witnesses testified. The petitioner Davis knew only that he had been standing near an elevator shaft when struck in the back by "something" and knocked a short distance into the shaft. He did not even know he had been hit by a fork lift tractor until after he was in the shaft (E. 13, 25), and there was no attempt to prove through Davis how the tractor happened to hit him or who, if anyone, was operating it at the time. Petitioner's "rebuttal" witnesses, Miller and St. Rose, knew nothing of how the accident happened. They merely ran to the shaft after hearing a scream and helped Davis get out (E. 91, 92, 99, 103). Respondent's witness Brown testified he had parked the tractor and gone to the men's room. He had no knowledge of the accident (E. 68). Byrd, the only witness claiming to have seen the accident, testified unequivocably that Davis himself got on the tractor and backed it into the shaft (E. 78). None of these five witnesses supplied one iota of proof to satisfy the petitioner's burden of proving respondent to have been negligent.

Both in the Trial Court and in the Court of Appeals petitioner sought to find the necessary proof in the testimony of the remaining witness Waldon, a contention which now appears to have been abandoned. Waldon merely saw a man walking "fast" on the other side of the elevator from where the accident happened (E. 31, 32, 52), and he ven-

tured the opinion that he was "almost sure he was a B & O employee" (E. 32), but he categorically refused to connect this man with the accident in any way. Any attempt to draw from his testimony an inference that the man was operating the tractor, or doing so in a negligent manner, must be "mere speculation or conjecture", as the Maryland Court of Appeals found.

Petitioner now retreats to the argument that the case became a jury case merely upon proof that the petitioner was hit by a B & O fork lift tractor, without any necessity to prove who operated the tractor or even that it had an operator at the time, and without need to prove in any way that employer negligence caused or contributed to its movement.

Petitioner first contends that res ipsa loquitur applies, a contention which not even petitioner thought worthy of argument in either court below. Even if the point may be raised for the first time in this Court, there is a fatal flaw to the application of res ipsa loquitur to the facts of this case.

All courts agree that the doctrine is inapplicable unless the instrumentality involved in the accident is proven to be under the control of the defendant at the time of the accident. *Jesionowski v. Boston & Maine Railroad Co.*, 329 U.S. 452, 67 S. Ct. 401 (1947); *Fassbinder v. Pennsylvania Railroad Co.*, 322 F. 2d 859 (3rd Cir. 1963); *Irwin v. United States*, 236 F. 2d 774 (2nd Cir. 1956); *O'Mara v. Pennsylvania Railroad Co.*, 95 F. 2d 762 (6th Cir. 1938). As the court said in *O'Mara*, *supra*, "The doctrine is one of necessity, applicable where the agency or place of the accident is accessible only to the defendant and under his control . . ." 95 F. 2d at p. 763. The reason for this requirement was explained by the Maryland Court of Appeals in *Lee v. Housing Authority of Baltimore*, 203 Md. 453, 462, 101 A. 2d 832, 836 (1954):

> "The element of control has an important bearing as negativing the hypothesis of an intervening cause beyond the defendant's control, and also as tending to show affirmatively that the cause was one within the power of the defendant to prevent by the exercise of care. Thus it has been held that the inference is not permissible where . . . the lapse of time and the opportunity for interference by others weakens the probability that the injury is attributable to the defendant's act or omission."

The necessary element of control was lacking in this case for several reasons. First, the uncontradicted evidence was that the B & O employee who had been using the tractor earlier in the day had left it parked on the floor of the pier and gone to the men's room before the accident occurred (E. 66, 67). This was corroborated by the eyewitness Byrd (E. 82) and further corroborated at least circumstantially by the testimony of petitioner's own witness Miller, who said that before the accident the "sugar stopped moving", which meant that the B & O employee Brown must have left the tractor or the tractor must have broken down (E. 93, 94, 98). There was no evidence to the contrary.

Of at least equal importance was the uncontradicted evidence, nowhere mentioned by petitioner in his Statement of the Case, that the area involved was being used by other persons not employed by respondent. Petitioner himself testified to this when questioned by the Court (E. 25):

> "Q. Had you seen this tractor right before it came in contact with you? A. No, ma'am. It was several tractors on the pier B & O tractors and Bull Line tractors, there were several tractors in this vicinity moving around."

Another of petitioner's own witnesses testified that some Bull Line steamship men were working near the elevator, and there were more than ten people in the area (E. 102). Any of these persons had ample opportunity to use the parked tractor. Indeed, for all the evidence shows, directly or inferentially, the accident may have occurred because a negligent Bull Line employee struck the tractor with his tractor and knocked it toward the shaft. Thus, one of the elements of res ipsa loquitur, control over the instrumentality at the time of the accident, was totally lacking.

Furthermore, there is grave doubt that res ipsa loquitur would apply even if the evidence showed such control, since the erratic movement or failure of machinery does not necessarily imply negligence. See *Glass v. Bair*, 233 Md. 194, 195 A. 2d 680 (1964); *Hilton Quarries, Inc. v. Hall*, 161 Md. 518, 158 Atl. 19 (1932).

Petitioner also complains that he was due the benefit of a presumption that the operator of a motor vehicle is the agent of the owner. The Maryland Court of Appeals is fully conversant with this presumption, having applied it in scores of cases. The presumption was briefed and argued in the Court of Appeals in this case, and no one disagreed with the principle that it could be applied in an F.E.L.A. action. It was not applied here for the simple reason that the factual situation did not give rise to the presumption.

The myriad of cases applying the presumption show that it is applicable to automobiles, trucks and similar vehicles which roam far and wide on the public thoroughfares of the nation and which in the typical case are involved at some distant place in an accident with a stranger who has never seen the vehicle or the driver thereof before, and who has no knowledge of or way of determining the circumstances under which the trip was undertaken or the

status of the offending driver. That is not this case. The fork lift tractor involved here was a small industrial machine which by its very nature is limited in use to lifting heavy loads and carrying them a matter of feet or yards within the confines of a small business facility where the employees, working together, are likely to have equal knowledge or opportunity to know of the work being done and the identity of the personnel doing it. In such a case no reason for the presumption exists.

Furthermore, in the present case there was no evidence that the fork lift was being operated by anyone, and petitioner not only assumes the existence of a driver, whom he then wishes to presume was an agent, servant or employee of respondent, but he also wishes to apply this presumption to choose between agents, servants or employees of respondent, since he was himself in that status at the time of the accident. Perhaps it is sufficient to say that the Court below, which has studied, analyzed and defined this common law presumption many, many times, was totally unimpressed with petitioner's argument.

This, then, is not a case where the Maryland Court of Appeals invaded the function of the jury as contended by petitioner, but merely one where it determined that there was *no* evidence, direct or circumstantial, from which employer negligence could be inferred by the jury. Its decision was clearly correct unless it be decided that the jury was entitled to speculate employer negligence from the testimony of the witness Waldon that he saw a man walking "fast" on the other side of the elevator from where the accident happened. Surely, as this Court said in *Inman v. Baltimore and Ohio Railroad Co.*, 361 U.S. 138, 80 S. Ct. 242 (1949), such testimony is "too slender a reed" to support such a conclusion.

CONCLUSION

The judgment of the Maryland Court of Appeals is in accord with the applicable decisions of this Court, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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